In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 614

CLARENCE A. ZACHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 29–45) is reported at 227 F. 2d 219.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1955 (Pet. 45) and a petition for rehearing was denied on December 12, 1955. The petition for a writ of certiorari was filed on January 9, 1956. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because it was based upon the "hear-

say" testimony of the Treasury agent who investigated the case.

2. Whether the admission into evidence of transcripts of petitioner's banking transactions violated his rights under the Fourth and Fifth Amendments.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner's motion for acquittal should have been granted because the Government failed to investigate a "lead" relating to the financial affairs of his mother-in-law.

5. Whether the trial court abused its discretion in excluding evidence tending to show that on his tax return petitioner had claimed insufficient depreciation on rental properties.

6. Whether the trial court committed reversible error in admitting into evidence charts listing the banking transactions of petitioner's wife, when the charts were not copied by the authenticating witness himself but were copied under his direction by another Treasury agent.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails

to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On January 7, 1954, petitioner was indicted in the United States District Court for the Eastern District of Missouri on five counts for wilful attempted evasion of individual income taxes for the years 1947 through 1950,[1] in violation of Section 145 (b) of the Internal Revenue Code of 1939. The amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 2–5):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1947 (Husband)	$17,493.52	$5,174.42	$21,101.73	$6,951.12
1947 (Wife)	6,958.24	1,422.60	8,302.49	1,805.70
1948	26,177.70	6,086.92	31,522.96	8,170.22
1949	28,860.68	7,102.16	34,764.72	9,536.48
1950	35,720.05	10,305.64	42,636.47	13,602.11
Total	115,210.19	30,091.74	138,328.37	40,065.63

[1] Separate returns were filed by petitioner and his wife in 1947, joint returns thereafter.

After a jury trial petitioner was found guilty on all counts. (R. 472.) On March 3, 1955, he was fined $2,000 on each count and sentenced to eighteen months imprisonment on each count, the terms to run concurrently. (R. 482–483.)

The evidence to support the verdict may be summarized briefly as follows:

On each of the tax returns in question, which were prepared by petitioner and for which he was entirely responsible (R. 42, 317–318), there were claimed as personal deductions contributions to religious, charitable and educational institutions, totalling $21,428.85 over the four-year period (R. 47, 55, 71, 89, 105).[2] The Treasury

[2] Of this amount $19,615.45 was claimed to have been contributed to twelve specified institutions over the four-year period as follows: Immaculate Conception Church, $2,452; Mary Queen of Peace Church, $675.25; St. John's Catholic Church, $2,759.85; St. Francis Xavier College Church, $1,580.25; St. Alphonsus Church, $2,252.40; Father Dempsey's Charities, $747.50; St. Vincent de Paul Society, $514; St. Peter and Paul Church, $2,417; St. Pius Church, $2,090.60; St. Margaret's Catholic Church, $2,009; Chaminade College, $1,776.85; and Benedictine Mission Home, $340.75. (R. 47, 55, 71, 89, 105.)

Although petitioner stated that the amounts claimed were "estimates" and that he had had no vouchers or other records from which to compute them (R. 324, 326) the amounts claimed with respect to each institution were usually in odd dollars, often in odd cents (R. 47, 55, 71, 89, 105).

It should be noted that petitioner knew the deduction for contributions was limited by law to 15% of the income (R. 321-322, 323) and that the amounts actually claimed on each of the five returns ranged between 14¼% and 14½% of the income (R. 328).

agents examined the canceled checks of petitioner and his wife and were able to find substantiation for only $25.50 of contributions in 1947, $22 in 1948, $29 in 1949 and $73.50 in 1950. (R. 295.) Petitioner admitted to the agents that he had not made and could not have made the contributions claimed on the returns (R. 325–326) and estimated that his actual expenditures for contributions had been about $200 each year (R. 119).

Representatives of the institutions in question testified that they had no knowledge of the donations claimed by petitioner and his wife and no record of such donations, although they had received anonymous contributions which, in total, were larger than the amounts claimed on petitioner's tax returns. (R. 115–118, 124–130, 142–144, 148–165, 185, Supp. R. 1–4.) [2]

In further corroboration of petitioner's admissions that the claimed payments had not been made, the Government proved that petitioner and his wife had not had sufficient cash funds available to cover such payments. All of their reported income, with the exception of certain rent checks, was deposited in their bank accounts

[2] The representative of Cheltenham College, however, did not so qualify his testimony. He stated that they maintained very exact records which showed contributions from petitioner totalling $17, and that over the four years the total of anonymous contributions was $375. Over the same period petitioner claimed $1,776.85. (R. 47, 55, 71, 89, 105, 148–151, Supp. R. 3–4.)

(R. 257–261, 320), as were all loans, gifts, inheritances and other non-taxable funds (R. 314, 319–320). During the prosecution years they never had more than $300 or $400 of undeposited cash on hand. (R. 314–315.) Their available cash, then, could have consisted only of funds received from cashing the rental checks plus cash funds withdrawn from their bank accounts. (R. 295.) These amounts compare with the claimed charitable contributions as follows (R. 47, 55, 71, 89, 105, 295):

Year	Available cash	Contributions claimed
1947	$2,251.92	$4,584.85
1948	2,410.70	4,973.10
1949	1,993.73	5,382.15
1950	2,094.08	6,488.75
Total	8,750.43	21,428.85

The Government also proved that petitioner claimed fictitious casualty losses in 1947, 1948 and 1949 (R. 47, 69, 83, 166–173, 352–355) and that he claimed excessive deductions for Missouri sales taxes paid in each of the four prosecution years (R. 47, 69, 83, 101, 189, 297–303).

Neither petitioner nor his wife testified at the trial.

ARGUMENT

1. Petitioner contends (Pet. 10–12) that the indictment should have been dismissed because it was based entirely upon incompetent "hearsay" testimony on the part of the Treasury agent who

investigated the case. Even if this characterization of the agent's testimony were correct (note his testimony as to petitioner's admissions against interest, *supra*, p. 5), the challenge to the indictment would necessarily fail under this Court's holding in *Costello* v. *United States*, No. 72, this Term, decided March 5, 1956.

2. Petitioner argues (Pet. 12–16) that his rights under the Fourth and Fifth Amendments were violated in that, in producing his records, he was "deliberately misled and deceived into believing that a civil investigation only was taking place" (Pet. 13). The record does not support this assertion. The revenue agent's examination began late in 1951, at which time petitioner produced the work papers he had used in preparing his 1949 return, the only return then under examination. (R. 21–22, 345.) Shortly thereafter, petitioner and his wife were advised that, although the examination was not complete, "things looked irregular, that it was a very serious matter." (R. 23.) Several weeks later, the Intelligence Division of the Bureau of Internal Revenue entered the case. (R. 23, 338, 345–346.) Special Agent Hanley, who was introduced to petitioner in January, 1952, as a special agent of the Bureau of Internal Revenue (R. 23, 205, 338), told petitioner that he had been assigned to work on the case with the revenue agent and asked whether petitioner had any objection to examination of his

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books and records. Petitioner replied that he had no objection and produced his records of income and the bank statements and canceled checks of himself and his wife. (R. 205–206.)[4] In two interviews held in February, 1952, petitioner was formally advised of his constitutional rights and thereafter continued his attitude of cooperation with the agents. (R. 25, 314–317.) When Hanley advised petitioner that this was a serious matter and that he should be represented by counsel petitioner took a religious symbol from his pocket and said he needed no representation other than that. (R. 342.)

We submit that the court below was plainly correct in holding that "The record clearly shows that the furnishing of all information and records by the defendant to the agents was entirely voluntary." (Pet. 39.) The record discloses nothing to support the argument that petitioner was "affirmatively misled." (Pet. 15.) Even if petitioner had not been warned before he surrendered the records in question that "it was a very serious matter" (R. 23), the mere failure of the agents to advise him of his constitutional rights would not render the records inadmissible in evidence. *Wilson* v. *United States,* 162 U. S. 613, 624; *Powers* v. *United States,* 223 U. S. 303;

[4] Although petitioner states (Pet. 13) that he produced his records in accordance with 26 U. S. C. 7602 (apparently referring to the Internal Revenue Code of 1954) there is no evidence that any statute was invoked by the agents.

Montgomery v. *United States,* 203 F. 2d 887, 892–893 (C. A. 5th); *Hanson* v. *United States,* 186 F. 2d 61 (C. A. 8th); *Turner* v. *United States,* 222 F. 2d 926, 931 (C. A. 4th); *United States* v. *Burdick,* 214 F. 2d 768 (C. A. 3d).

3. The contention (Pet. 16–21) that the evidence was insufficient to support the verdict is plainly without merit. Petitioner's admissions that he had not made and could not have made the charitable contributions claimed on the returns, and that his actual contributions were only about $200 per year (*supra,* p. 5), as contrasted with the $21,428.85 claimed over the four-year period (R. 47, 55, 71, 89, 105), were amply corroborated by (1) the fact that the agents could find only 23 checks totalling $150 to substantiate the claimed deductions; (2) the testimony of representatives of the institutions in question that they had neither personal knowledge nor records of contributions by petitioner or his wife; (3) the fact that the agent's analysis showed that the cash available to petitioner and his wife for *all* expenses paid in currency was far less than the claimed contributions alone; and (4) miscellaneous circumstantial evidence showing intent, such as the "estimating" of contributions in odd amounts and the claiming of fictitious casualty losses and state taxes paid. See *supra,* pp. 4–6. *Smith* v. *United States,* 348 U. S. 147, 154–156.

4. The contention (Pet. 22–23) that the conviction should be reversed because the Govern-

ment disregarded a "lead" furnished by petitioner with respect to the financial affluence of his mother-in-law is frivolous because (1) this is not a net worth case like *Holland* v. *United States,* 348 U. S. 121, 135–136, but a case based on specific false deductions; (2) the fact that the mother-in-law possessed substantial funds, even if true, would not tend to show that petitioner or his wife made the claimed contributions to charity; (3) the contention was first made shortly before the statute of limitations was about to bar prosecution on Counts I and II, two years after the agents began their investigation (R. 1–3, 24–25, 36–40); (4) it was in conflict with previous admissions of petitioner (R. 320–321, 325); (5) whatever gifts or inheritance may have been received by petitioner or his wife from her mother were deposited into their bank accounts and hence were accounted for (R. 314–315, 319–320); and (6) in no event could such funds affect Counts IV and V of the indictment, relating to 1949 and 1950, because the mother-in-law died in May, 1948, leaving no cash (R. 425–428).

5. Petitioner urges (Pet. 23–24) that the trial court erred in excluding "evidence as to improper rates of depreciation", arguing that this would have proved that he had understated an allowable deduction, thus tending to negative the idea of wilfullness with respect to "minor page two deductions and casualty losses." Since the Government took no issue with the depreciation deduc-

tions claimed on the returns, this was purely a collateral matter and the rulings were entirely within the discretion of the trial court. That it was a matter of minor significance is shown by the fact that the depreciation claimed each year was only $311.40 (R. 53, 67, 81, 99).[5] Even if the useful economic lives of the properties were much lower than those upon which petitioner based his deductions the additional amounts allowable would have been small in comparison with the understatements of net income (*supra*, p. 3).[6]

[5] Petitioner's offer of proof also included properties not listed on the returns, in which petitioner's wife had a one-third interest with her two brothers. (R. 189–196, 394–405.) Her share of the net rentals was reported as a lump-sum figure each year. (R. 53, 67, 81, 99.) The correctness of the rates of depreciation used in arriving at these figures could have no bearing on petitioner's wilfullness because such matters were determined solely by petitioner's brother-in-law, Bernard Wander, who handled the properties for his brother and sister and computed the amounts reportable by each as income. (R. 189–196, 200–201, 420, 424.) Moreover, the claiming of too small a depreciation allowance on these properties for the year 1950 could have no effect on the case because for that year petitioner's wife reported the $1,550 actually received by her (without regard to depreciation but after deductions for substantial capital expenditures) rather than her distributive share of the net income of the joint venture, $2,173.38. (R. 99, 194–196.)

[6] Further, it should be noted that (1) the consistent claiming of a modest depreciation rate works to a taxpayer's advantage upon sale of property by decreasing his taxable capital gain (Section 113 (b) (1) of the Internal Revenue Code of 1939) and this very factor worked to petitioner's advantage in this case in 1947, 1948 and 1949 (R. 51, 65, 85);

6. Finally, petitioner contends (Pet. 25–27) that the trial court erred in admitting into evidence Government's Exhibits 17–B (a transcript of the bank deposits of petitioner's wife) and 19–A, 19–B, 19–C and 19–D (transcripts of the checks drawn by her) (R. 207–208, 223–255, 275–295), because they were authenticated not by the revenue agent who prepared them but by the special agent who supervised his work. Petitioner argues that the holding of the court below (Pet. 42–44) is in conflict with *Hartzog* v. *United States,* 217 F. 2d 706 (C. A. 4th). In that case, the work papers of a deceased agent were held inadmissible because they "were the product of his judgment and discretion" (*id.,* p. 710), in that they classified "checks, check stubs and other records into the various categories of income, the various categories of allowable deductions, the categories of personal or other non-deductible expenses, the category of non-taxable receipts, and the categories of capital or ordinary gains

(2) petitioner's offer of proof was rejected partly on the theory that depreciation should be based on the useful economic life from the date of acquisition rather than (as the offer contemplated) from the first prosecution year, 1947 (R. 395–405); and (3) petitioner's expert witness was testifying on the basis of examinations made in 1954 (R. 401), whereas the useful economic life for depreciation purposes is controlled by facts existing at the time the deduction is claimed rather than facts existing many years later. *Commissioner* v. *Mutual Fertilizer Co.,* 159 F. 2d 470 (C. A. 5th); *Commissioner* v. *Cleveland Adolph Mayer Realty Corp.,* 160 F. 2d 1012 (C. A. 6th).

and losses" (*id.*, p. 708). The court there pointed out that the work sheets were not prepared under circumstances that would provide a guarantee of trustworthiness and that there was no opportunity for anyone to tell when an error or misstatement had been made. In the instant case, the exhibits in question are no more than copies of the records furnished by petitioner relating to his wife's banking transactions. The deposits and disbursements are simply listed by the revenue agent as they appeared on those records, with no attempt at classification. They were prepared under the direct control and supervision of the special agent, who had personal knowledge of their contents and who made some cross-checks with the original bank records to insure their accuracy. (R. 203, 206–208, 274–275, 339, 358–359.) There is nothing in the record tending to show any error in the exhibits (though petitioner could easily have demonstrated such error if it existed) and it seems clear that the objection of insufficient authentication is a purely formal one and without merit. *United States* v. *Mortimer*, 118 F. 2d 266 (C. A. 2d), and cases cited at pp. 269–270.[7]

[7] Petitioner specifically challenges (Pet. 27) the column in Government's Exhibit 19–D (R. 277–293) headed "Remarks", arguing that those entries may have reflected the "independent conclusions of the revenue agent." An examination of the exhibit, however, in the light of the testimony makes it apparent that the "Remarks" could represent only the explanation of each disbursement as stated by petitioner's wife on the check stubs. (R. 206–207, 274–275, 339, 359.)

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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